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IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Petitioners

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES,

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF GREATER MEDIA CABLEVISION, INC. IN SUPPORT OF THE POSITION OF DANIEL L.MEDLOCK, et al.

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Brief Amicus Curiae of Greater Media Cablevision Inc. in Support of the Position of Daniel L. Medlock, et at.

INDEX

	Page
The Interest of Greater Media Cablevision, Inc.	1
Brief Submitted Pursuant to Rule 37	2
Summary of Argument	3
Argument	4
Conclusion	16
Certificate of Service	17

CITATIONS

CASES:

Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987)	4, 11
Medlock v. Pledger, 301 Ark. 483, 785 S.W.2d 202 (1990)	11, 12
Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983)	4, 9, 11
Suburban Cable TV Co., Inc. v. Commonwealth, 131 Pa. Commw. Ct. 368, 570 A.2d 601 (1990)	6

CONSTITUTIONAL PROVISIONS:

First Amendment, U.S Constitution	3, 4, 5, 10, 12, 13, 15,

STATUTORY PROVISIONS:

State:

Act 188 of 1987	3, 5, 16
Act 769 of 1989	3, 5, 16

THE INTEREST OF GREATER MEDIA CABLEVISION, INC.

Greater Media Cablevision, Inc. is a Delaware corporation providing cable television services to, among others, residents of the Commonwealth of Pennsylvania.

BRIEF SUBMITTED PURSUANT TO RULE 37

Greater Media Cablevision, Inc. submits this brief as amicus curiae pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

At issue in this case is whether the taxing scheme applicable to mass communications media that was enacted by the Arkansas General Assembly violates the guarantees of freedom of speech and the press contained in the First Amendment to the United States Constitution. The Supreme Court of Arkansas held that the imposition of sales tax on cable television services by Act 188 of 1987 was unconstitutional, but declined to hold that a subsequent law, Act 769 of 1989, was also unconstitutional.

This case presents the important and unresolved question of whether a state may impose differential taxation on cable television as compared to other mass communication media, including newspapers and magazines, in the absence of any compelling state interest other than the general need to raise revenue. The continuing ability of the states to tax cable television in a manner different than that imposed on other forms of television and on newspapers and magazines threatens to undermine the constitutional guarantees of freedom of speech and of the press.

ARGUMENT

NO DIFFERENTIAL TAXATION OF MASS COMMUNICATIONS MEDIA SHOULD BE PERMITTED, ABSENT A SHOWING OF A COMPELLING STATE INTEREST OTHER THAN THE GENERAL NEED TO RAISE REVENUE

Two fundamental errors have been committed by the Arkansas General Assembly in enacting a sales tax on cable television services: the failure to recognize the discriminatory nature of such a tax when compared to (1) over-the-air television and "scrambled" satellite television; and (2) newspapers, magazines and other print media. This Court is presented with the opportunity to clarify its decisions in Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) and Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987), by holding that, in the absence of some compelling interest other than the general need to raise revenue, any tax imposed on cable television that is not also imposed on other forms of television technology and on newspapers and magazines violates the First Amendment to the United States Constitution in that it abridges freedom of speech and of the press.[1]

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[1] The arguments regarding the applicability of the First Amendment guarantees to cable television will be discussed in the Petitioners' Brief.

A. The General Assembly of Arkansas Has Created a Taxing Scheme That Essentially Results in the Imposition of Tax on Only one Form of Television, in Violation of the First Amendment

When it enacted Act 188 of 1987, the General Assembly of Arkansas created the following tax situation: cable television services were subject to tax, as were magazines sold "over the counter." No other form of television was subject to tax, including satellite television that is received as a scrambled signal, nor was any tax imposed on newspapers or on magazines sold by subscription.

Subsequently, the General Assembly enacted Act 769 of 1989, which imposed a sales tax on scrambled television signals received by subscribers in Arkansas, but only if the billing took place within the state. The practical result of that taxation method is that few, if any, subscribers to satellite television are required to pay sales tax.

In addition, no one receiving over-the-air television is subject to sales tax on that service because no direct charge is made by over-the-air television companies for their services. Therefore, of the various types of television services, only one form of this First Amendment-protected form of speech, cable television, is effectively subject to taxation.

The basis for the taxing scheme imposed by Arkansas is very simple. The Respondents admit that the only motive in imposing the sales tax is to raise revenue. No other valid interest, such as defraying the cost of regulation, is identified as a reason for the imposition of tax in this manner. In fact, Arkansas has chosen the simplest means of collecting revenue, without regard to any determination of fairness or uniformity. Arkansas has, by doing so, taxed in dramatically different ways communications media that are virtually identical in their functions and in the services they provide to the public.

The three forms of television transmission that are involved in this case, cable, scrambled, and over-the-air, represent three stages in the development of providing television signals to the public. All three have considerable identity in their functions. The decision of the Commonwealth Court of Pennsylvania in Suburban Cable TV Co., Inc. v. Commonwealth, 131 Pa. Commw. Ct. 368, 570 A.2d, 601 (1990), now on appeal to the Supreme Court of Pennsylvania, demonstrates the almost complete functional identity between cable television and over-the-air television. Both of these forms of technology begin by receiving television signals in various ways and, using the same or

similar equipment, amplify, process, and modulate the signals before they are transmitted to the public. It is only in the final stage, sending the signal from the television station to the home television receiver, that a difference exists. Over-the-air television sends its signal out through the airwaves, while cable television uses cable, or a combination of cable and over-the-air technology, to transmit to the public. Over-the-air television makes no charge for its services directly to the subscriber, while cable television does. There is nothing inherent in either form of technology that dictates the manner in which it will earn the revenues that support it. It is conceivable that over-the-air television could have developed as a service that charged subscribers rather than one depending on advertising revenues, and it is also possible that cable television could have developed as a service dependent on advertising revenues.

"Scrambled" satellite transmission has elements of both of the technologies referred to above. It travels over the airwaves, like over-the-air television, but cannot be viewed without the payment of a fee, like cable television.

The technological difference in how the television signal is received by the public does not change the fact that

identical information is often received over all three media. Indeed, every cable subscriber receives most or all of the over-the-air television channels in his reception area, but through a cable rather than over-the-air. Significantly, the incidence of this tax falls on the form of television which, far more than the others, provides for the increased dissemination of ideas, thoughts, and speech. An over-the-air television viewer may receive news from two or three television stations, but a cable subscriber is typically able to receive a much larger number of channels, with a concomitant increase in the viewpoints that may be considered by the public. Cable television companies, by offering channels such as C-SPAN and CNN, provide a vastly greater amount of news to the public. It is this particular form of technology on which Arkansas has decided to impose the sales tax. Arkansas has chosen to burden one form of television only, and for the sole reason that the tax is easily imposed and collected from this form of television. This is the real basis for the Arkansas tax system: tax whatever form of television will provide revenue in the easiest manner.

It is submitted that no distinction among the various forms of television justifies the difference in taxation by the State of

Arkansas. As this Court stated in Minneapolis Star and Tribune, while a general tax that happens to include the press poses no threat,

> "[a] power to tax differentially... gives a government a powerful weapon against the taxpayer selected.... [D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.... Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot continue such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585.

In this case, what counterbalancing interest justifies the difference in taxation among the various forms of television? No state interest based upon the form of technology used to transmit or receive television signals has been suggested by Arkansas, nor is there a compelling interest related to the greater variety of programming available on cable television. There is no compelling state interest to justify the difference in the taxation among the various forms of television. There is, however, a state interest to justify the difference and that is the ease of collection of the tax. This is not, however, a compelling state interest, implicating, as it does, only the

state's need for revenue. Further, there are alternative methods of taxation that justify the state's need for revenue without requiring such complete differentiation among the several forms of television, such as income and franchise (value) taxes. Clearly, Arkansas has identified no compelling state interest that justifies the taxation of the several forms of television in such radically different ways.

Further, Arkansas cannot hide its different taxation of cable television and scrambled satellite television by stating that the form of taxation is the same but the incidence of taxation different. It has created a taxation scheme that makes it easy for almost all satellite subscribers to avoid that tax. Taxation that has the result of improper discrimination cannot be justified because the tax, on its face, does not appear discriminatory.

For these reasons, the taxation of cable television services by Arkansas should be held unconstitutional, on the basis of violation of the First Amendment by comparison with other forms of television.

B. By Comparison of the Taxation of Cable Television With the Taxation of Print Media, the Arkansas Sales Tax Violates the First Amendment

Arkansas imposes its sales tax on magazines sold "over the counter" and at newsstands while exempting newspapers and magazines sold by subscription. Thus, a significant portion of the print communications media escapes the sales tax. As is indicated above, those types of news media that are subject to the tax are those from whom it is easiest to collect the tax, a taxation scheme which should not survive analysis under the guidance provided by Minneapolis Star and Arkansas Writers' Project.

In its decision below, the Supreme Court of Arkansas stated as follows:

> In none of the cases discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. 301 Ark. at ___, 785 S.W. 2d at 204.

The Court further stated:

> We must hold, however, that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium. Id.

This Court should recognize that television, newspapers, and magazines are all mass communications media and that, for purposes of the protections provided by the First Amendment, there are no significant differences among them.

On the face of it, there appear to be many differences between television and newspapers. Although both convey information and entertainment to the public, and both charge a fee for doing so, they do it in very different ways. Should these differences permit Arkansas to impose a different taxation scheme? This Court should hold that they do not, and that, in the absence of some compelling state interest other than the mere need to raise revenue, no difference in taxation among any mass communications media can be allowed to exist.

In their Brief in Opposition to Petition for Writ of Certiorari, the Respondents described cable television as being "of a character completely dissimilar to the press." Brief at 8.

The error in this statement lies in the failure to ask for what purpose the comparison is being made. In this case, the purpose is to determine whether, for purposes of the First Amendment, the similarities among the communications media are sufficient to warrant requiring that they have the same method of taxation applied to them.

Both cable television and newspapers reach a large percentage of the population and, in recent years, have become the principal competing methods by which the American people receive information on current events. Both charge a fee for this service. Both contain daily news, entertainment, and sports. Both are somewhat ephemeral in nature, although they have permanent aspects as well. Cable television is seen by the viewer, but only preserved if the recipient chooses to tape it. A newspaper is printed on paper but is typically discarded promptly.

What are the differences? A newspaper is tangible property, can be held in the hand, and is generally purchased on an individual, daily basis. A newspaper has a singular nature about it, while cable television seems to have more variety. The distribution methods of the two media are very different. A newspaper is subject to no significant regulation,

while cable television is subject to regulation on the federal and local levels and sometimes on the state level.

Despite the foregoing obvious differences, it is submitted that no differences exist to justify the different taxation schemes. Both newspapers and cable television come into the home, although by different means. In both cases, something enters the home. While a newspaper is clearly tangible, cable television, consisting of light, can also be thought of as physically entering the home. The work of numerous physicists, including Albert Einstein and Max Planck, suggests that light may consist of particles which enter the home to deliver information to subscribers. As indicated, cable television may be accorded a more permanent nature through the use of a recording device.

Further, why should the greater variety of information received via cable television as compared to newspapers make a difference? A newspaper typically has numerous sections, corresponding to different channels on cable television. Many people subscribe to buy several newspapers and magazines. When these are "bundled" together, they are the functional equivalent of a cable television system. The fact that one form of communication must be read while the other is

projected in spoken words and pictures does not suggest any significant difference for purposes of the application of the First Amendment.

CONCLUSION

For these reasons, the decision of the Supreme Court of Arkansas should be affirmed with respect to its holding that Act 188 of 1987 is unconstitutional and reversed with respect to its refusal to determine that Act 769 of 1989 is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 1990, I personally caused to be served upon the following, true and correct copies of the Brief Amicus Curiae of Greater Media Cablevision, Inc. in Support of the Position of Daniel Medlock, et al., in the within matter, by mailing same, first class and postage prepaid, to:

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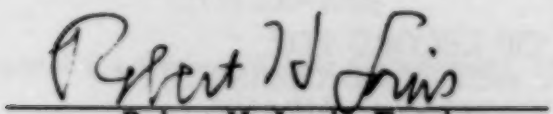

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